

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 173 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA : Sd/-

HONOURABLE MR.JUSTICE KS JHAVERI : Sd/-

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1 Whether Reporters of Local Papers may
be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the
fair copy of the judgment ?

Whether this case involves a
substantial question of law as to the
4 interpretation of the constitution of
India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the
civil judge ?

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PARTHINGBHAI MALABHAI DAMOR & 1 - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

MR DF AMIN for Appellant(s) : 1 - 2.

MR HL JANI APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 26/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Sec.374 of the Code of Criminal Procedure has been preferred by the appellants-accused (original accused nos.1 and 2) who have been charged and tried for the offence punishable under Sec.302 read with 34 of Indian Penal Code in Sessions Case No.174 of 1995 wherein they were convicted to undergo imprisonment for life and fine of Rs.1,000/-, in default, to undergo simple imprisonment for one month by the learned Additional Sessions Judge, Panchmahal, camp at Dahod vide judgment and order dated 03.01.1999. However, no separate sentence was imposed for the offence under Sec.323 of Indian Penal Code. They have been acquitted for the offence under Sec.504 and 114 of the Indian Penal Code. It is also ordered to set off the period they were kept in judicial custody.
2. The case of the prosecution in short is that there was a dispute between the complainant and the accused persons regarding the agricultural land and for that, civil litigations were going on between the parties before the Court. As a result of that, on

20.02.1994, when the complainant, her husband (deceased), her son - Varu were at home, both the appellants-accused armed with stick (Dang) came and started abusing them. The accused no.1 pushed the deceased and as a result of that, he fell down and, thereafter, the accused no.2 gave stick blow on the stomach of the deceased and, thereafter, as others have intervened, the accused persons left the scene of offence. As the deceased became unconscious, the neighbours and others took him to hospital and ultimately he succumbed to the injuries. As it being night time, the complainant could not contact the Police Authority, but on the next day with the help of Sarpanch, she went to Jhalod Police Station and lodged the complaint against both the appellants, which came to be registered as Jhalod Police Station I-C.R.No.20/1994 for the offence under Sections 302, 324, 504 and 114 of the Indian Penal Code on 21.02.1994. Thereafter, the P.S.O. handed over the investigation along with the yadi, FIR and report to Police Inspector, Shri D.M. Parghi (P.W.No.10, Exh.27). In pursuance of that, he started further investigation. He drew the inquest panchnama in the presence of panchas, filled up Maranottar Form and also made arrangements to

send the dead body for postmortem along with the Maranottar Form, inquest panchnama and yadi. Simultaneously, he also went to the scene of offence and drew the scene of offence panchnama in the presence of panchas. He also recorded the statements of various witnesses and arrested the accused persons. He also sent muddamal to FSL along with forwarding letter and also collected the postmortem report. On receiving the FLS and postmortem reports, same were kept along with the investigation file. Upon completion of investigation, he submitted the charge sheet against the accused persons for the offence under Section 302, 323, 504 and 114 of the Indian Penal Code and under Section 135 of the Bombay Police Act before the Learned Judicial Magistrate, First Class, Jhalod.

3. As the offence alleged against the accused was exclusively triable by the Court of Sessions, same was committed to the Court of Sessions at Panchmahal where it was numbered as Sessions Case No.174 of 1995.
4. Thereafter, the case was transferred and placed for trial before the learned Additional Sessions Court, Panchmahal, camp at Dahod for disposing of the same on merits. On production of the accused, the Learned

Additional Sessions Judge framed charge vide Exh.2 against the appellant, wherein the appellants-accused pleaded not guilty to the charge and claimed to be tried.

5. To prove the charge against the accused, prosecution examined, in all, 12 witnesses and also placed reliance upon documentary evidence numbering 9.
6. On submission of closing purshis by the prosecution, learned Additional Sessions Judge recorded further statement of the accused under Sec.313 of Cr.P.C. qua the incriminating question wherein the accused came out with the case of total denial. The accused did not examine any witness nor stepped into the witness box. Therefore, after hearing the learned counsel appearing for the respective parties, learned Addl. Sessions Judge delivered the impugned judgment giving rise to file the present appeal.
7. We have heard learned counsel for the appellants, Mr.D.F. Amin and learned Additional Public Prosecutor, Mr.H.L. Jani for the respondent-State.
8. Learned counsel for the appellants, Mr.Amin has taken us through the medical evidence, more particularly, evidence of P.W.No.1, Dr.Atul Babulal Sarvaiya, Exh.7 along with

P.M.Note, Exh.8 and inquest panchnama, Exh.20 and argued that P.W.No.1, Dr.Atul Sarvaiya has categorically deposed in his evidence that he has not found any external mark of injuries upon the body of the deceased at the time of performing the postmortem. He has further deposed that at the time of incident, the deceased was aged about 60 years. As far as external mark of injuries are concerned, he has taken us through the evidence of doctor, more particularly, paras 5, 6, and 7 of his evidence for the purpose of cause of death. He has taken us through paragraph no.8 of his evidence, wherein doctor has categorically deposed that the injuries received by the deceased could be possible by way of hard and blunt substance. It is also argued that when the muddamal stick was shown to him, he opined that the internal injuries received by the deceased could be possible by muddamal article stick. He has also taken us through the cross-examination of the above referred witness and argued that in his cross-examination, he has clearly admitted that if any push of stick is given to anybody then, that type of mark of injuries can be possible. Except that, there is no further cross-examination of the said witness. Thus, in view of the above referred evidence, the

appellants-accused cannot be convicted for the offence under Section 302 of the Indian Penal Code.

9. He has also taken us through the evidence of two important witnesses i.e. P.W.No.3, Soniben Jitharabhai (complainant), Exh.15 and P.W.No.4, Varubhai Jotharabhai (son of the deceased), Exh.17 along with the complaint, Exh.16 and argued that as per the say of the above referred two witnesses, the injuries received by the deceased are due to kick and fist blows as well as push of stick. In this regard, he has drawn our attention regarding the discussion made by the Court below qua the above referred evidence. It is also argued that in absence of external mark injuries, it can be said that the stick has not been used at all and at the most, it can be considered as a case of only one blow.
10. Mr.H.L. Jani, learned Additional Public Prosecutor, who appears on behalf of the respondent-State has taken us through the above referred evidence, upon which, reliance has been placed by the learned counsel for the appellants. It is argued that it is a case of homicidal death and same has been proved by way of evidence of Dr.Atul Sutariya, P.M.Note - Exh.8 and inquest panchnama - Exh.20. After taking us through

the evidence of wife (P.W.No.3) and son of the deceased (P.W.No.4) as well as complaint at Exh.16, it is also argued that the complaint and oral evidence of Soniben and Varubhai is consistent one and there are no contradictions. They have been cross-examined by the learned advocate appearing before the Court below, but nothing contrary has been come out. Not only that, the incident took place at night hours in front of the house of the deceased, more particularly at about 9:40 p.m. and, therefore, their presence at their residence is natural one. It is also argued that even the appellants-accused and the complainant side are from the same community and are from same village and practically they are relatives and civil disputes were going on in connection with the agricultural land prior to the incident and, therefore, question of misidentification cannot be arisen at all. He has fairly admitted that it is true that the medical evidence shows that there are no external mark of injuries, but only on that ground, case cannot be said to be falling under Section 302 of the Indian Penal Code when the livers has been ruptured. In this regard, he has taken us through the medical evidence, P.M.Note, cause of death certificate and relevant discussion to that

effect. It is submitted that there are sufficient evidence available on record to connect the appellant-accused with the crime in question. He placed reliance upon the judgment reported in 1986(1) GLR 386, AIR 1994 SC 474 and 1986(2) GLR 1426. Mr.Jani has, therefore, urged that the learned trial Judge was perfectly justified in coming to the conclusion that the appellant-accused has committed the crime. It is also submitted that looking to the facts and circumstances of the case and seriousness of the offence, sentenced awarded by the Court is just, proper and reasonable and, therefore, the Court should not interfere with the same. Raising the abovesaid contentions, Mr.Jani has urged that the present appeal deserves to be dismissed.

11. We have gone through the oral as well as documentary evidence shown to us by the learned counsel for the respective parties and the reasoned judgment delivered by the Court below. It is required to be noted that P.W.No.1-Dr.Atul Babulal Savariya, Exh.7 has categorically deposed in his chief-examination that at the time of postmortem, he has not found any external injuries found on the body of the deceased. In paragraph no.5 of his deposition, he discussed

regarding the cause of death and also narrated regarding internal injuries upon the dead body. In paragraph no.7, this witness gave cause of death and in paragraph no.8, he opined that the internal injuries received by the deceased are possible by way of hard and blunt substance. It is required to be noted that after seeing the muddamal, the doctor has opined that the injuries received by the deceased upon the body are possible by way of muddamal article no.8 (stick). Even Col.Nos.17 and 20 of the postmortem note, Exh.8 also supports the say of the prosecution in toto. In short, we are of the view that the doctor has not been examined at all on the point of external mark of injuries. The doctor in his cross-examination has admitted that when somebody gives push of the stick then, these type of external mark of injuries can be possible. Except that there is no further cross-examination of the doctor and, therefore, the deposition given by the doctor regarding the external injuries remained unchallenged. We have also gone through the same and we are of the opinion that it is a case of homicidal death.

12. Now for the purpose of connecting the accused with the crime in question, reliance is placed upon the evidence of two witnesses

i.e. the evidence of wife of the deceased and son of the deceased. On going through their evidence, we accept the arguments advanced by the learned counsel for the appellants, Mr.Amin that their presence at the time of incident is natural and, therefore, we are not discussing further into the matter. We have also kept in mind that both these witnesses are the interested witnesses. However, law on this point is settled. Merely because they are interested witnesses, their evidence cannot be discarded. What is required to be done is to minutely scrutinizing their evidence and after scrutinizing the same, if the Court comes to a conclusion that their evidence is trustworthy, free from doubt and reliable, the Court can convict the accused. According to us, their evidence are trustworthy and reliable and they do not require any corroboration.

13. As far as the role played by the present appellants-accused is concerned, there are evidence on record of the above referred two witnesses and their presence at the time of incident along with the role. It is required to be noted that the main role has been assigned to the appellant-accused no.2, Babubhai Malabhai Damor. There is evidence on

record that from the very beginning, the appellant-accused no.2, Bachu was having stick in his hand and he has used the same. There are also evidence on record that the internal injuries could be possible by way of stick.

14. As far as appellant-accused no.1 is concerned, in our opinion, the prosecution has failed to connect the him with the crime in question. Except his presence at that time of incident, he has not played any role. He is one of the relatives of both the witnesses as well as the deceased. If at all, he has tried to intervene in the incident in question, merely on that ground, he cannot not be involved into the crime in question because they are staying in same locality.
15. As far as the evidence qua accused no.2 is concerned, he was present armed with stick and has given blow of it and thus, his role has been established. However, looking to the way in which the incident has occurred, the case cannot be said to be the one falling under Section 302 of the IPC, but can be treated as the one under Section 304, Part II.
16. Reliance has been placed upon the judgment reported in 1986(2) Vol.27 GLR 1426, more particularly, towards head note, which reads

as under :-

"Indian Penal Code (XLV of 1860) - Secs. 300, 302, 304 Part I and Part II - Distinction between the three offences - A stab wound on the thigh muscle cutting the femoral artery and vein resulting into the death of the victim - The offence is one punishable under sec. 304 Part II only."

13. The result of the aforesaid discussion is that the appeal of the appellants-accused is required to be partly allowed and the Judgment and order of convict qua appellant-accused no.1 is required to be set aside and the conviction of the appellant-accused no.2 for the offence punishable under Sec. 302 I. P. C. and the sentence of imprisonment for life imposed upon him for the same is required to be set aside and he is instead required to be convicted of the offence punishable under Sec.304, Part II, I. P. C.
14. The appeal is partly allowed. Judgment and order of conviction and sentence dated 19.01.1999 delivered by the Learned Sessions Judge, Panchmahal camp at Dahod in Sessions Case No.174 of 1995 are quashed and set aside appellant no.1 i.e. the original accused no.1 viz., Parthingbhai Malabhai Damor. He is, therefore, ordered to be set at liberty forthwith, if not required in any other offence. He is on bail and, hence, his bail bonds shall stand cancelled.

15. As far as appellant no.2 i.e. original accused no.2 viz., Bachubhai Malabhai Damor is concerned, his conviction for the offence punishable under Section 302 of the Indian Penal Code is set aside and he is ordered to be acquitted of that offence. He is, however, convicted for the offence under Section 304, Part II of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years. He is on bail and, hence, his bail bond stands cancelled. He is directed to surrender before the jail authority within two months from today."

Sd/-

Sd/-

(R.P.DHOLAKIA, J.) (K.S.JHAVERI, J.)

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